S. PATHMANATHAN v. AMARAVATHI & ORS.

[O.C.J. (Gunn Chit Tuan J.) January 26, March 21, June 28, 29, 30 and August 12, 1977]

[Penang — Civil Suit No. 361 of 1973]

Land Law — Agreement to sell land — Land charged to finance company — Purchaser agreed to purchase land subject to charge — Payment by instalments — Death of purchaser — Balance of purchase price still left unpaid — Purchaser's family in possession of property — Claim for possession against defendants not privy to contract for sale — Whether plaintiff entitled to possession.

Contract — Agreement to sell land to deceased — Part payment of purchase price — Defendants in possession of property — Inability to pay balance of purchase price — Defendants not privy to contract for sale — Whether plaintiff entitled to possession.

One Kathamuthu agreed to purchase a piece of land from the plaintiff for $18,000. The land was subject to a charge in favour of a finance company in the sum of $9,125.33. The said Kathamuthu agreed to pay by way of instalment the sum of $9,125.33 which was to be set-off against the purchase price of $18,000. The said Kathamuthu died before he could complete the purchase, and left a balance of $4,000 still unpaid.

The defendants, members of the deceased's family, who were in possession of the said property, were unable to pay the balance of the purchase price. The plaintiff claimed for possession and damages for unlawful occupation. The defendants contended, *inter alia*, that the plaintiff had by her conduct acquiesced in the delay and the defendants relied on the doctrine of "promissory estoppel". The letters of administration had not been extracted by the defendants because they could not find sureties.

The issue was whether the plaintiff could recover possession of the said property from the defendants who were not privy to the contract for sale of it.

Held: (1) the plaintiff was entitled to possession of the said property;

(2) the principle of promissory estoppel did not apply to the present case where there was no contractual relationship between the parties to the present suit.

Cases referred to:-

(1) *Parkin* v. *Thorold* (1852) 16 Beav. 59, 65.

(2) *Central London Property Trust Limited* v. *High Trees House Ltd.* [1947] K.B. 130.

(3) *Hughes* v. *Metropolitan Railway Co.* (1877) 2 App. Cas. 439.

(4) *Wong Kup Sing* v. *Jeram Rubber Estates Ltd.* [1969] 1 M.L.J. 245, 247.

(5) *Anjalai Ammal & Anor.* v. *Abdul Kareem* [1969] 1 M.L.J. 22, 25.

(6) *Emmanuel Ayodeji Ajayi* v. *R.T. Briscoe (Nigeria) Ltd.* [1964] 3 All E.R. 556.

(7) *Tool Metal Manufacturing Co. Ltd.* v. *Tungsten Electric Co. Ltd.* [1955] 2 All E.R. 657.

(8) *Morris* v. *Tarrant* [1971] 2 Q.B. 143.

CIVIL SUIT.

S. Thillamuthu for the plaintiff.

Sam Mathuram for the defendants.

Cur. Adv. Vult.

Gunn Chit Tuan J.: The plaintiff became the registered proprietor of a piece of land known as Holding 1277 Town Subdivision 5 North East District, Penang, together with premises thereon called No. 72, Lengkok Tembaga, Island Park, Penang (hereinafter called "the said property") on May 31, 1968. On that same day she executed a charge of the said property in favour of Peninsular Finance Berhad to secure a loan to herself of $9,500 with interest at the rate of 9½ per centum per annum repayable by 182 monthly instalments of $101.14 each over a period of 15 years 2 months with effect from the 1st day of June, 1968.

On or about October 19, 1970, the plaintiff orally agreed to sell the said property to one S. Kathamuthu s/o Subbiah and the said S. Kathamuthu agreed to purchase it on the following terms and conditions: —

(a) the price of the said property was $18,000.

(b) the said S. Kathamuthu was to take a transfer of the charge of the said property subsisting in favour of the Peninsular Finance Berhad in respect of the aforesaid loan which then stood at $9,125.33, and the said sum of $9,125.33 was to be set-off against the purchase price of $18,000. The said S. Kathamuthu was also to pay the sum of $101.14 being the instalment due by the plaintiff to the said Peninsular Finance Berhad on November 1, 1970, and a sum of $24.19 in repayment to the plaintiff of the deposit for electricity and water for the said premises. A sum of $9,000, particulars of which are shown below, was therefore to be paid to the plaintiff.

Particulars

Agreed purchase price of property		$18,000.00
Less Loan therein due by Plaintiff to Peninsular Finance Berhad on said charge as at October 1970		9,125.33
		$ 8,874.67
Add instalment due by Plaintiff for November 1970 to Peninsular Finance Berhad payable by S. Kathamuthu	$101.14	
Add Deposit for water and light for said house repayable by S. Kathamuthu to plaintiff	24.19	125.33
		$ 9,000.00

(c) the said S. Kathamuthu was to pay $4,000 on October 19, 1970, when he was to be given possession of the said property and the balance of $5,000 was to be paid on or before March 31, 1971, when the transfer of the said property was to be completed in favour of him.

(d) the said S. Kathamuthu was to make his own arrangements with Peninsular Finance Berhad to take the transfer of the charge of the said property in his favour, and until the completion of the transfer of the said property in his favour on or before March 31, 1971, he was to pay the monthly instalments that became due and payable to Peninsular Finance Berhad upon the said charge. He was also to pay the quit rent and assessment due and payable in respect of the said property after January 1, 1971.

Pursuant to the said agreement, S. Kathamuthu paid the plaintiff a sum of $4,000 on October 19, 1970. Both parties executed a memorandum in writing of that date (see page 31 of Exhibit "A") pertaining to the sale, and thereafter on the 2nd day of November, 1970, S. Kathamuthu went into possession of the said property together with the 1st defendant, who was his lawful wife, and the 2nd and 3rd defendants, who

were his lawful sons. On or about September 10, 1971, the said S. Kathamuthu paid the plaintiff a further sum of $1,000 to account of the said balance of $5,000.

S. Kathamuthu died on or about the 15th day of June, 1973, having failed to pay the balance sum of $4,000 and to complete the purchase or to take the transfer of the said charge in his favour, whilst the plaintiff had always been ready and willing, on payment of the balance of $4,000 and of the monthly instalments payable to Peninsular Finance Berhad, to execute a transfer of the said property and the said charge to him.

After the death of the said S. Kathamuthu, the 1st, 2nd and 3rd defendants continued in possession of the said property and were still in possession of it during the hearing of this suit in the year 1977. By then, the late S. Kathamuthu and/or the defendants had paid to Peninsular Finance Berhad a sum of $1,314.82 being the monthly instalments due and payable under the said charge for the period from November 1970 to November 1971 inclusive. They have also paid the monthly instalments due and payable for the months of February, March, May, June, August, September, October, November and December, 1973 amounting to $1,011.40. However, the late S. Kathamuthu and the defendants were not regular in their payment of the instalments due to Peninsular Finance Berhad and at one stage (see pp. 42-43 and 46-49 of Exhibit "A") a notice and an originating summons under section 254 of the National Land Code were issued and served on the plaintiff, who in order to avoid sale of the said property by the chargee, had to pay the latter $809.12 being the instalments due and payable for the period December 1971 to July 1972 inclusive (see p. 52 of Exhibit "A"). She also paid Peninsular Finance Berhad two sums of $404.56 and $101.14 (see pp. 53 and 57 of "A") being the instalments payable for the period August 1972 to November 1972 and for January 1973, respectively. She also paid the instalment of $101.15 for the month of July 1973, the assessment for the second half of 1972 (see p. 76 of "A") and the costs of the proceedings referred to above (see p. 50 of Exhibit "A").

Before the death of S. Kathamuthu, the plaintiff wrote to him through a solicitor (see pp. 44 and 45 of "A") on July 14, 1972, and then again on December 23, 1972 (see pp. 54-56 of "A"), requesting him to pay the balance of the purchase price of $4,000 and the instalments, assessment and costs paid by her. The first letter required the late Kathamuthu to pay the balance within 21 days whilst the second letter gave him 14 days within which to complete the purchase, but there was no response to both letters. Although the plaintiff was willing to complete her part of the agreement, the late Kathamuthu failed to complete the purchase of the said property and after his death the defendants continued in occupation of it.

In spite of the notice in the said letter of December 23, 1972, the plaintiff raised no objections when the late Kathamuthu and later the defendants paid the finance company all the monthly instalments for 1973 except for the months of January and July 1973. She and her husband (PW1) also allowed the defendants to pay the assessment for 1973 and the instalments due and payable during 1974. After receiving the said notice in December 1972, the second defendant saw the plaintiff's husband and told him that they were prepared to complete the sale by settling the outstanding sum due to the plaintiff. PW1, on behalf of his wife, the plaintiff, did earlier on, that is, after issuing the notice of December 23, 1972, promise to allow the 2nd defendant time to raise money to pay the outstanding sum of $4,000, but they both later changed their minds and on the 30th day of November, 1973, decided to issue the writ in this suit against the defendants for possession of the said property, damages for unlawful occupation, etc.

Although the late S. Kathamuthu died in June 1973, his sons, i.e. the 2nd defendant (DW1) and one of his brothers, did not apply for Letters of Administration of their father's estate until August 1975 and Letters of Administration were only granted to them on July 27, 1976. At the time of the trial of this suit in 1977, the said grant had still not been extracted by them because they could not find sureties. In 1974, however, the 2nd defendant saw the plaintiff and told her husband (PW1) that he was trying to raise money from a finance company as administrator of his father's estate, but did not succeed in getting any loan because he had not obtained Letters of Administration. Since then the defendants have not given the plaintiff any indication as to when the balance of the purchase price would be paid.

In his address, counsel for defendants submitted that the notice of December 23, 1972, was not valid and referred to the following passage in *Halsbury's* Laws of England (3rd Ed.) Vol. 8 at page 165: —

> "282. *Notice making time of the essence.* In cases where time is not originally of the essence of the contract, or where a stipulation making time of the essence has been waived, time may be made of the essence, where there is unreasonable delay, by a notice from the party who is not in default fixing a reasonable time for completion and stating that, in the event of non-completion within the time so fixed, he intends to enforce or abandon the contract. But the time fixed must be reasonable having regard to the position of things at the time when the notice is given, and to all the circumstances of the case."

He then referred to the case of *Parkin* v. *Thorold*[1] in which the plaintiffs had sued for the specific performance of a contract for sale of a freehold estate sold by them and where Romilly M.R. had said as follows: —

> "At law, time is always of the essence of the contract. When any time is fixed for the completion of it, the contract must be completed on the day specified, or an action will lie for the breach of it. This is not the doctrine of a Court of Equity; and although the dictum of Lord Thurlow, that time could not be made of the essence of the contract in equity, has long been exploded, yet time is held to be of the essence of the contract in equity, only in cases of direct stipulation, or of necessary implication."

Counsel for defendants also contended that even if the said notice of December 23, 1972 was good, the plaintiff had by her conduct acquiesced in the delay. Reference was also made to the *High Trees*[2] case and to the case of *Hughes* v. *Metropolitan Railway Co.*[3] on "promissory estoppel" by counsel who suggested that the promise of the plaintiff and her husband

operated in equity to suspend the plaintiff's legal rights until reasonable notice to resume them had been given.

On the need to give reasonable notice of abandonment of a contract, the court was referred to the decision of Raja Azlan Shah J. (as he then was) in the case of *Wong Kup Sing* v. *Jeram Rubber Estates Ltd.*[4] in which His Lordship held that once the time for completion was allowed to pass and the parties went on negotiating, then time was no longer of the essence of the contract and the defendants must give a reasonable notice of their intention to abandon the contract if the balance is not paid. Counsel therefore submitted that after the death of S. Kathamuthu in June 1973, the plaintiff should have given a fresh notice to the Chief Justice or after March 14, 1974, to the Official Administrator in whom the property of an intestate vested until an order for a grant of administration to an administrator by the court has been made, because time was still not of the essence of the contract.

Counsel for the plaintiff, on the other hand, referred to the statement of defence filed by the defendants and submitted that they could not at that stage raise the question of waiver or acquiescence because neither had been pleaded by them in their said statement of defence. He referred to the following passages at pages 337 and 382 in the "Principles and Forms of Pleadings" by Sures Chandra Ghosh: —

"*Acquiescence:* Acquiescence implies either 'that a person abstain from interfering while a violation of his legal rights is in progress' or 'that he refrains from seeking redress when a violation of his rights, of which he did not know at the time, is brought to his notice'. In the first sense, which is the proper legal sense, acquiescence operates by way of estoppel by words or conduct. In the latter sense, acquiescence is an element in laches. The defendant must plead that the plaintiff having a right, and with knowledge of his legal right, stood by and saw the defendant dealing with property in a manner inconsistent with the right of the plaintiff (that is to say, expending money or doing some act on the faith of his mistaken belief while the act was in progress). This is the defence of acquiescence in the first sense. The defence of laches is a defence of lapse of time and delay involving (a) acquiescence on the plaintiff's part and (b) change of position that has occurred on the defendant's part and 'causing a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy'.

In either sense, acquiescence is an equitable defence and must be specially pleaded."

"*Waiver:* A right may be waived either by express words or by conduct inconsistent with the continuance of the right: and even where there is no actual waiver, the person having the right may so conduct himself that it becomes inequitable for him to enforce it. Waiver, therefore, is a matter of special pleading."

After referring to the case of *Anjalai Ammal & Anor.* v. *Abdul Kareem,*[5] counsel for plaintiff submitted that the defendants should, if they had pleaded acquiescence or waiver, also have given particulars of them on the part of the plaintiff. In any case, Order 19 rule 15 of the Rules of the Supreme Court, 1957, requires every new fact to be specially pleaded and Order 19 rule 17 requires any denial to be specific. In this case, there were no amendments to the pleadings to raise the new issues.

In my view, it was not necessary for the purposes of this suit to decide whether or not the notices of July 14, 1972 and December 23, 1972 were valid. It was, of course, arguable that the conduct of the plaintiff, before the death of Kathamuthu in June 1973, would appear to suggest that she was prepared at that stage to consider time not to be the essence of the contract between her and the said deceased. But the suit in this case, which was filed about six months after Kathamuthu's death in June 1973, was merely a claim for possession by the plaintiff, who is still the registered proprietor of the property in question, against the three defendants, who are the widow and two sons of the late S. Kathamuthu. As the pleadings stood, the main issue for trial was whether the plaintiff was entitled to claim possession of the said property from the three individuals sued as defendants. As counsel for defendants has pointed out, most of the facts in this case were not disputed. In the statement of defence, the defendants had merely pleaded that the "plaintiff has no cause of action against the defendants", and, as correctly pointed out by counsel for the plaintiff, the defendants have not pleaded what rights they had to possession of the said property. It was clear that this was not a suit by either the plaintiff or the 2nd defendant and his brother as the legal representatives of their deceased father's estate, for specific performance of the contract in question. The question of acquiescence or waiver was not raised in the pleadings and were not issues before the court, but even if the pleadings had been amended, it would, in my opinion, be still arguable whether the conduct of the plaintiff, who instituted this action within six months of the death of the late S. Kathamuthu, could be said to amount to acquiescence on her part in the occupation of the said property by the defendants or in the continued delay in completing the purchase of it. The three defendants in this suit were not party to the contract between the plaintiff and the late S. Kathamuthu and they have frankly and quite surprisingly pleaded in the statement of defence that "as the defendants are not parties to the verbal agreement or to the Memorandum in writing as executed between the plaintiff and the said S. Kathamuthu (deceased) the defendants are not privy to such an arrangement". There was also no need in this case for the plaintiff to give notice to the defendants that she was abandoning the contract between her and the late Kathamuthu. The issue here was simply whether the plaintiff could and should recover possession of the said property from the three defendants as individuals who were not privy to the contract for the sale of it, and to my mind, she was, as against the three defendants, entitled to possession of the said property.

Finally and with respect to counsel for defendants, I think I need not consider fully the point touched by him on "promissory estoppel". As pointed out above, the three defendants in this suit were not party to the contract in question. Even if there was privity of contract between them and the plaintiff, it has been established and held in the Privy Council case of *Emmanuel Ayodeji Ajayi* v. *R.T. Briscoe (Nigeria) Ltd.*[6] that the principle of promissory estoppel as confirmed by the House of Lords in *Tool Metal Manufacturing Co., Ltd.* v. *Tungsten Electric Co., Ltd.*[7] was that when one party to a contract in the absence of fresh consideration agreed not to enforce his rights an equity would be raised

in favour of the other party. That equity was, however, subject to the qualifications (1) that the other party had altered his position; (2) that the promisor could resile from his promise on giving reasonable notice, which need not be a formal notice, giving the promisee a reasonable opportunity of resuming his position; and (3) the promise only became final and irrevocable if the promisee could not resume his position. Without reciting here the facts of the said Privy Council case, it is only necessary to reiterate that the said principle of promissory estoppel does not apply to our present case where there is no contractual relationship between the parties to the present suit (see *Morris* v. *Tarrant*[8]). On the issue raised in the pleadings as they stood, I therefore held that the plaintiff was entitled to possession of the said property and ordered the defendants to deliver possession thereof to the plaintiff within one month from the date of judgment on June 30, 1977. Since the plaintiff filed this suit on November 30, 1973, she has been suffering damages by reason of the wrongful occupation of the said property which she could have let out at $120 per month. I should have also awarded damages to her amounting to $5,160 for the period December 1973 to June 1977 inclusive, but as it was clear that there would in due course be a suit for specific performance by the 2nd defendant and his brother, as the administrators of the estate of the late S. Kathamuthu, against the plaintiff, I therefore thought it would be more appropriate to leave the issue of damages to be dealt with in any subsequent proceedings by the estate of the deceased. No question of damages for breach of the agreement for sale arises in this case, and apart from the order of possession, I only ordered costs against the defendants.

Order accordingly.

Solicitors: *Thillaimuthu & Phock Kin; Mathuram & Co.*

SINGMA SAWMILL CO. SDN. BHD. v. ASIAN HOLDINGS (INDUSTRIALISED BUILDINGS) SDN. BHD.; MALAYSIAN CO-OPERATIVE AGENCIES LTD., CLAIMANTS

[O.C.J. (Syed Othman J.) August 29, 1977]
[Johore Bahru — Distress Suit No. 1 of 1977]

Practice and Procedure — Distress — Machinery belonging to claimants found on defendants' premises — Machinery seized — Distress Ordinance, 1951, ss. 10 & 12(1).

Distress — Seizure of machinery belonging to claimants — Machinery on defendants' premises — Scope of ss. 10 & 12(1) of Distress Ordinance. 1951.

On January 30, 1977, on application by the plaintiffs, the court issued a distress warrant to distrain the movable property found on the defendants' premises together with a factory to recover $27,600 being nine months' rent due by the defendants. On February 8, 1977 the sheriff seized all movable property on the premises including the machinery. On February 17, 1977 the claimant filed a notice of objection claiming that the machinery belonged to them and requested that they be released within 3 days. The plaintiffs ignored the notice. On February 24, 1977 the sheriff issued a notice to the plaintiffs as to the claim by the claimants, and on February 28, 1977, he issued interpleader summons.

The plaintiffs conceded that the machinery belonged to the claimants but maintained that the machinery was still subject to seizure. The claimants stated that the machinery was leased to the defendants for a year. On expiry of the lease, the claimants found that it would cost them $20,000 to remove the machinery and decided to let it remain on the premises whilst looking for buyers or other persons willing to rent the machinery. The evidence showed that the machinery remained on the defendants' premises for 8 months after the expiry of the said lease.

Held: (1) by the proviso to section 10 of the Distress Ordinance 1951 the court was not required to release the distrained goods unless it was satisfied that the immediate tenant had no right of property and that the goods belonged to the claimant. Even if the court was satisfied with these two ingredients, it would not necessarily follow that the court must release the goods. The court could still order them to be distrained if they fell under any of the categories of goods listed in section 12;

(2) the circumstances required that the claimants, as owners, should have taken positive steps if not at the outset, at least after the expiry of the lease, to assert that the machinery belonged to them. Instead, they were largely responsible for representing that the defendants' assets lay with the machinery and for painting the defendants with the colour of ownership of the machinery.

Cases referred to:-

(1) *Challoner* v. *Robinson* [1907] 1 Ch. 51.

(2) *Re Couston, Ex. p. Watkins* (1873) 8 Ch. App. 520.

DISTRESS SUIT.

Y. Sivaloganathan (*T. Annathurai* with him) for the claimants.

Ong Ban Chai for the plaintiffs.

Cur. Adv. Vult.

Syed Othman J.: On January 30, 1977 on application by the plaintiffs, the court issued distress warrant to distrain the movable property found on the premises of the defendants in Johore Bahru together with a factory to recover $27,600 being 9 months' rent due by the defendants. On February 8, 1977 the sheriff seized all movable property on the premises including the machinery. On February 17, 1977 the claimants filed a notice of objection claiming that a list of machinery belonged to them and requested that they be released within 3 days. The plaintiffs ignored the notice. On February 24, 1977 the sheriff issued a notice to the plaintiffs as to the claim by the claimants, and on February 28, 1977 he issued an interpleader summons.

The issues agreed in the first instance for trial were (1) whether the goods are owned by the claimants, and (2) if so, whether the claimants are entitled to have the goods released.

At the hearing, on August 21, 1977 the plaintiffs' side conceded that the machinery belonged to the claimants, but maintained that the machinery was still subject to seizure. Issue (2) therefore remains to be determined.

The evidence as adduced by the general manager of the claimants in his affidavit of March 14, 1977 and in court shows that the claimants had purchased the machinery from Singapore; payment was completed on May 14, 1975; on June 15, 1975 they leased the machinery to the defendants for a year at $1,500 per month; on expiry of the lease the claimants found that it would cost them about $20,000 to remove the machinery to Kuala Lumpur and they decided to let it remain on the premises whilst looking for buyers or other persons willing to rent the machinery.